No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONERS

Central States, Southeast and Southwest Areas Pension Fund moves the Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari of petitioners Local 144 Nursing Home Pension Fund, et al. Central States urges that the United States Court of Appeals for the Second Circuit be reversed. The reasons for this motion are as follows:

1. Central States Pension Fund is the largest multi-employer defined benefit pension plan in the country.

The Pension Fund covers approximately 400,000 active participants and retirees.

2. Central States is governed by the Employee Retirement Income Security Act of 1974, as amended. Sections 4231 through 4235 of ERISA provides the exclusive means for a pension plan like Central States to transfer assets and liabilities to another plan.

3. The Central States pension plan and trust agreement bars Central States from transferring liabilities to another plan; hence, pursuant to Section 4234 of ERISA, 29 U.S.C. § 1414, Central States is prohibited from transferring assets to another plan.

4. If the decision of the court of appeals were applied to Central States, it would be obligated to transfer assets to a new plan at the discretion of an employer that withdraws from Central States. Such a transfer would violate the plan and ERISA.

5. Transfers of assets, especially when not accompanied by transfers of vested liabilities, are actuarially unsound and could lead to the insolvency or termination of Central States and hundreds of similarly situated multiemployer pension plans.

6. Petitioner consents to the filing of this brief. Respondent refuses to consent. The Petition was served on Respondent on October 15, 1991.

Respectfully submitted,

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QUESTION PRESENTED

The United States Court of Appeals for the Second Circuit ruled in the decision below that it was a structural defect under § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), for a multiemployer pension plan and a multiemployer health and welfare plan that were established pursuant to collective bargaining to refuse to transfer assets attributable to contributions made on behalf of an employer's employees when the employer left the old plans and joined new plans. The court held that a portion of the assets of the old plans must be transferred involuntarily to the new plans upon demand of the employer.

The question presented is—

Whether § 302(c)(5) of the LMRA overrides the provisions of ERISA, 29 U.S.C. § 1411-1415, which purport to be the exclusive rules for transfers of assets and liabilities between multiemployer defined benefit pension plans, so that an employer that withdraws from a multiemployer defined benefit pension plan and creates a new plan is entitled under § 302(c)(5) to have assets of the old plan attributable to contributions made by the employer on behalf of its employees transferred to the new plan.

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BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONERS

INTRODUCTION

Central States, Southeast and Southwest Areas Pension Fund ("Central States" or "Pension Fund") is a multiemployer defined benefit pension trust fund established in 1955 by affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations

Act (LMRA). Central States is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). Central States is administered for the exclusive benefit of the participants to whom the Trustees owe an undivided duty of loyalty. The purpose of the Pension Fund is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the Central States pension plan (the "Plan").

Under the Trust Agreement participating employers contribute to Central States pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. Under the Pension Fund employees earn credit (accrued benefits) for covered work periods and after earning 10 years of credit, become vested in the benefits. In order for an employer and its union employees to participate in the Fund, their collective bargaining agreement, including the contribution rates, must conform to the Trust Agreement and the Plan. If an employer's obligation to contribute ceases, then coverage ceases for employees of the employer. Neither employees nor retirees of the employer, however, lose their vested benefits under the Pension Fund.

INTERESTS OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

The United States Court of Appeals for the Second Circuit posed the following question in the case below:

> [W]hether, when an employer leaves pension and welfare trust funds in favor of another set of trust funds, § 302(c)(5) of the Labor Management Relations Act ("LMRA") requires a reallocation of monies paid to the former funds on behalf of its employees, so that the monies are used "for the sole and exclusive benefit of the employees of such employer" as those terms are used in § 302(c)(5).

The court answered yes, that a reallocation of assets from the old trust funds to the new trust funds is mandatory in those circumstances. If the court of appeals is correct, then the financial integrity and solvency of all such trust funds is placed in immediate jeopardy. Forty years of settled expectations and reliance under the LMRA will have been undone. It would be irrational for employers *not* to take advantage of this change of law to seize the assets to their more direct benefit at the cost of undoing these trust funds.

It would be difficult to overstate the impact of the decision below on multiemployer pension plans. These plans are pooled trusts pursuant to the requirements of the LMRA under which all the assets of the plan are available to satisfy any benefit under the plan. The court of appeals has in effect, however, empowered employers who contribute to such plans with the right to divert assets attributable to contributions on behalf of their employees to another plan without regard to the liabilities left behind in the old plan.[1] This may not be a power that every employer will wish to use—at least initially. Only those employers that stand to gain economically will have the incentive to leave the old plan. This is a zero-sum game, however. If the employers who leave achieve an economic gain, then the old plan and the employers that remain behind are the losers. With each withdrawal the growing deficit in the old plan creates additional incentives for more withdrawals, escalating until plan failure and termination occurs. Indeed it may even become strategically necessary for a plan to voluntarily terminate

[1] Indeed, the court of appeals seems to have disregarded entirely that the trust funds are independent entities with rights and obligations that are separate from the collective bargaining parties. The old pension fund must still pay the vested benefits of even the transferred employees from the now diminished assets. Even if the new fund purported to assume vested liabilities (it did not), there is no mechanism by which the employees can be required to forfeit their vested rights in the old plan.

to gain the statutory right to reallocate its unfunded liabilities among previously withdrawn employers. In sum, if these plans cease to be pooled trusts for all purposes (the effect of the decision below), their rapid decline and ultimate demise is assured.

This is not an idle or abstract concern of Central States. The Central States Pension Fund consists of 250,000 active participants and 150,000 retirees. Since September 26, 1980, Central States has lost 150,000 participants as thousands of employers have ceased contributing to the Pension Fund. Of these, approximately 1250 employers have been assessed withdrawal liability pursuant to the 1980 amendments to ERISA, 29 U.S.C. § 1381 et seq. Withdrawal liability is a withdrawing employer's pro rata share of the plan's unfunded vested benefits.[2] To date Central States has collected in excess of $319 million in withdrawal liability.

If employers who withdraw from Central States can, simply by creating a new plan of their own, demand and receive a share of Central States assets, they have, in effect, reduced the amount of or eliminated their withdrawal liability. In creating withdrawal liability Congress sought in part to discourage withdrawals. If an employer can reduce the cost of withdrawal, it will make economic sense for more employers to withdraw.[3]

In addition, as noted above, Central States (and most multiemployer pension plans) have some degree of unfunded vested benefits. When assets are taken from the plan, the deficit grows. Such losses must be borne by

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[2] Central States presently has $1.7 billion in unfunded vested benefits—the difference between $12.2 billion in vested benefits and $10.5 billion in current assets.

[3] By leaving higher cost vested benefits in the old plan for other employers to fund and starting a new plan with lower benefits and smaller costs plus assets from the old plan, an employer could gain a significant competitive advantage.

contributing employers and their employees. In some cases contributions may have to be raised to meet ERISA's minimum funding standards, and increased contributions reduces the employer's resources available for wages and other benefits. Even if contributions are not raised, it will take longer to fund the existing benefits, thus reducing resources that might have been used to raise benefits (for example, for cost of living increases).

Ironically, as each employer takes assets from the plan for its own new plan, it would raise the level of unfunded vested benefits from which the withdrawal liability of future withdrawn employers will be calculated. Delaying a withdrawal would be progressively more costly for an employer—a further incentive for early withdrawal. Even employers that might not otherwise consider withdrawing, might be forced to do so by rising plan costs. Since no employer will want to be the last one left in the plan to carry the burden of all residual plan liabilities alone, there is potential for a stampede; termination by mass withdrawal of all remaining employers may become the only rational alternative.

In short, one of Congress' principal purposes in the 1980 amendments to ERISA—encouraging plan continuation—would be undermined due to the destabilizing effect of forced asset transfers. If this Court does not grant the writ of certiorari and, ultimately, reverse the court of appeals, the end for multiemployer plans cannot be far behind.[4]

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[4] Of course it is possible (even probable) that the other courts of appeals will disregard the Second Circuit decision. Given the importance Congress attached to stabilizing these plans, however, this Court should not wait for the case law to sort itself out, thereby jeopardizing, in the interim, the benefits of innumerable multiemployer plan participants.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Second Circuit ruled in the decision below that it was a structural defect under § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), for a multiemployer pension plan and a multiemployer health and welfare plan that were established pursuant to collective bargaining to refuse to transfer assets attributable to contributions made on behalf of an employer's employees when the employer left the old plans and joined new plans. The court held that a portion of the assets of the old plans must be transferred involuntarily to the new plans upon demand of the employer.

In so ruling the court of appeals disregarded that the Employee Retirement Income Security Act of 1974, as amended, provides the exclusive means for transferring assets and liabilities between multiemployer pension plans. See 29 U.S.C. § 1411-1415. Plans like Central States are not required by ERISA to transfer assets as the court of appeals would require. If allowed to stand, the court of appeals decision would allow employers to select adversely against the actuarial interests of Central States and other such plans. Because it is generally in the pecuniary interests of employers to make such choices, it would lead to the decline and almost certain failure of such plans in contravention of the purposes of ERISA. This Court should grant the writ of certiorari in order to reconcile this court-created conflict between the statutes.

REASONS FOR GRANTING THE WRIT

By enacting § 302(c)(5) of the LMRA Congress permitted, *inter alia*, the creation of multiemployer benefit trust funds.[5] It was not, however, until the enactment of

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[5] The following discussion will concentrate on the effect of the court of appeals' decision on multiemployer pension plans. Pension plans present special concerns because they provide vested benefits

ERISA in 1974 that Congress sought to comprehensively regulate these and other funds. The 1980 amendments to ERISA sought further to foster multiemployer pension plan continuation by correcting certain destabilizing influences that threatened a flood of plan terminations. Now by the decision below the Court of Appeals for the Second Circuit has disregarded all of ERISA's regulation. As if it were operating in a regulatory vacuum, the court has returned to the earlier LMRA to put a gloss on its language that overrides the subsequent ERISA regulation.

Specifically, the LMRA does not provide any rules regarding the transfer of assets and liabilities among plans, but ERISA does. The LMRA does not provide any rules for an employee's vesting in any assets or benefits under the plan, but ERISA does. Further the Internal Revenue Code and regulations, not the LMRA, provide when termination of a group of participants constitutes a partial termination of the plan requiring that the participants become vested in their benefits to the extent they are funded. Finally, only ERISA provides how assets are allocated to benefits under a plan. Yet the court of appeals, seeking to correct a perceived "structural defect," has used the LMRA to circumvent this reticulated regulatory scheme and provide a remedy directly at odds with it.

It is axiomatic that in any defined benefit plan not every participant will receive a benefit under the plan. Only participants who meet the service and other requirements for benefits will receive them. Amounts contributed on behalf of those who do not earn benefits, fund, in part, the benefits of those who do. This translates into a universally accepted actuarial funding assumptions under which employers pay less in contributions per participant. If the court of appeals is right, then the funding assump-

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under ERISA standards that are not affected by the decision below (except to the extent the decision deprives the plan of assets to pay the vested benefits).

tions of all multiemployer defined benefit plans have been wrong since their inception.

Another core premise upon which multiemployer plans are founded is that in certain industries an employee's work relationship is with the industry as a whole as much as with any particular employer. If an employee's relationship with any one employer is brief, then the employee might never earn a pension from the employer's plan. As the employee moved from one employer to another, benefits in the first employer's plan (if there even were a plan for that employer) would be forfeited and the employee would have to start over in the new employer's plan (if there were one), perhaps never earning a vested benefit in any plan, even though spending much of a working life as a participant in these plans.

Multiemployer plans were an attempt to remedy this problem by permitting the industry through collective bargaining between unions and groups of employers to set up mulitemployer plans. All employers would contribute to the plan, and employees would retain all benefits under the plan earned with any contributing employer. These plans are, and were intended to be, pooled trusts. That is to say that while employee participants earn rights to benefit under the plan, they do not acquire rights to any particular assets of the plan. The assets must be used "for the sole and exclusive benefit of the employees of [the contributing] employer . . . jointly with the employees of other [contributing] employers. . . ."[6] Section 302(c)(5). Accordingly the assets from all sources are available to satisfy any benefit under the plan regardless of source.

This kind of plan is a "defined benefit plan," which is to say that the participant earns rights to specified bene-

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[6] Inexplicably the court below ignored the parenthetical language in the statutory provision, which clarifies that contributions are not segregated by employer but rather are general assets available to pay benefits of any contributing employer's employees.

fits, not just the assets of the plan. This is significant because there may not be sufficient assets, at any given time, to cover all promised benefits, nonetheless the participant knows the benefit she or he will receive without regard to the day to day fluctuations in asset values.

Not all plans are this type. Some may be "defined contribution plans." In this kind of plan the participant is provided an account into which contributions are made on his or her behalf. Upon distribution (at retirement or otherwise) the participant receives the assets in the account. There is no guaranteed benefit level. If, due to a down market or bad investments, the account loses value, the participant will receive a smaller benefit than otherwise. Another type of "plan" might contain an account for each employer. This would actually constitute an aggregate of single-employer plans (most likely defined benefit plans) and would not be a multiemployer plan like Central States.

What the court of appeals has created is a hybrid. The Local 144 pension plan is a defined benefit multiemployer plan, but the court afforded withdrawing employers certain rights to assets as if the plan were an aggregate of single-employer plans.[7] What distinguishes the Local 144 plan from a defined contribution plan or an aggregate of single-employer plans, however, is that vested benefits of the employees who left the plan remain behind as liabilities of the old plan even when assets are transferred and certain liabilities are assumed by the new plan. Leaving vested benefits in the old plan while transferring assets to the new plan produces a mischief that threatens all multiemployer plans.[8]

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[7] Taken to its logical limit the court of appeals decision would also seem to mandate treating these plans as defined contribution (individual account) plans even though the court expressly disclaims an intent to reach that far.

[8] Even asset transfers accompanied by vested liability transfers are troublesome. Congress strictly limited the eligibility for such

The following example illustrates the dangers of this kind of asset transfer to a plan like Central States:

If we assume that the old plan, before the transfer, had 10 units of vested benefits, 10 units of non-vested benefits, and 8 units of assets, then it would have 2 units of unfunded vested benefits.

OLD PLAN: BEFORE TRANSFER

Vested Liabilities	= 10 Units
Non-Vested Liabilities	= 10 Units
Assets	= 8 Units
Unfunded Vested Benefits	= 2 Units
Ratio of Assets to Vested Liabilities	= 80%

Assume further that employer and employee characteristics are very uniform and that half the employers (and half the employees) transfer to the new plan, taking half the assets. The old plan would retain all 10 units of vested benefits but only 4 units of assets for an increase in unfunded vested benefits to 6 units. The new plan would acquire 4 units of assets but no vested benefits and 5 units of non-vested benefits would be recognized by the new plan and lost by the old plan.

OLD PLAN: AFTER TRANSFER

Vested Liabilities	= 10 Units
Non-Vested Liabilities	= 5 Units
Assets	= 4 Units
Unfunded Vested Benefits	= 6 Units
Ratio of Assets to Vested Liabilities	= 40%

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transfers in 29 U.S.C. §§ 1411-1415. Mandatory transfers take place only under § 1415. Voluntary transfers of assets are permitted only where liabilities are transferred. § 1414. Central States, like many such plans, bars liability (hence asset) transfers by the terms of the plan.

NEW PLAN: AFTER TRANSFER

Vested Liabilities	= 0 Units
Non-Vested Liabilities	= 5 Units
Assets	= 4 Units
Unfunded Vested Benefits	= 0 Units
Funding Surplus	= 4 Units

The ratio of assets to vested benefits in the old plan drops from 80% to 40%. Since only vested benefits get paid, the old plan is more poorly funded while the new plan has no vested liabilities and thus has a 4 unit surplus in assets. Over time the new plan may acquire vested liabilities and additional assets due to new contributions. But the new plan's assets provide a comfortable cushion—its ratio of assets to vested liabilities will remain greater than 100% for an indeterminate length of time—which should translate into lower contribution obligations of employers.[9]

The impact of this kind of transfer may be amplified in another way not shown by the diagrams. If the workforce is not uniform within each employer, the employees transferred to the new plan may have favorable actuarial attributes from a funding standpoint that would enhance their value to the new plan and the loss to the old plan. This would be the case if the transferred employees were younger than those left in the old plan. Younger employees may not vest thus creating benefit forfeitures that allow assets contributed on their behalf to be applied to other vested benefits thus reducing the need for current contributions. And even if some of the younger employees do vest, there is generally more time available before their retirement to fund their benefits—a factor that also reduces the need for current contributions. Even the em-

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[9] This description is generally valid for any transfer of assets to the new plan that is not accompanied by a transfer of vested benefit liabilities. The ratios would depend on the actual characteristics of the employers and employees and how much is actually transferred, but the net affect will always be a loss to the old plan and a surplus to the new plan.

ployer with an older (actuarially unfavorable) workforce may over time see a shift, as older employees retire, to a younger (actuarially favorable) workforce. By transferring the current (younger) employees to a new plan, the employer can avoid the retiree costs as well. See *Central Hardware Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 770 F.2d 106, 110-111 (8th Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986). In the old plan the burden of funding vested benefits, including the retirees of the now-departed employer, will be corresponding higher for the contributing employers left behind.

This is a type of adverse actuarial selection that is all too common in multiemployer plans. Employers often seek to split a bargaining unit to leave older employees in a plan where they will draw their vested pension benefit while younger employees are placed in the employer's separate plan (or no plan) at great savings to the employer. Of course plans like Central States forbid this practice. See *Central States v. Gerber Truck Service*, 870 F.2d 1148 (7th Cir. 1989).

> Our pattern must be common: An employer wants some of its employees to have pension and health benefits, and others not. Some may be only a few years away from vesting. Pension and welfare trusts, like insurers generally, want to avoid 'adverse selection', the dropout of persons safer or younger than the pool's average. Funds insist that members of a group be in or out as a bloc: the fund cannot cover the old and infirm at a rate computed from group averages while receiving nothing on behalf of younger employees. Employers often strongly wish it were otherwise. Local unions may not care about selective inclusion in pension plans (since the costs are borne by employers in other parts of the country), and from their perspective having some workers covered is better than having none.

Id. at 1151-52. But under the court of appeals decision employers now have a means of direct attack on Central States to achieve a similarly damaging actuarial result.

The court of appeals apparently realized that it was treading dangerous ground. Thus it stated that its decision did not require asset transfers for individual employees who leave a plan, but only for employees of an employer who leaves the plan. Further it stated that the asset transfer would apply only to the extent of liabilities undertaken by the new plan. The court failed, however, to provide a supporting rationale for these limitations or principles upon which to derive one; thus leaving us only with the court's *ipse dixit*. We have already shown that the assumed liabilities were non-vested hence provide no relief to the old plan. But even if the new plan assumed vested benefit liabilities, that would not relieve the old plan of its obligations to pay the vested benefits, and participants would retain their rights against the old plan. ERISA provides the exclusive means of transferring such benefits. See 29 U.S.C. §§ 1411 through 1415.[10]

Further if one is allowed to ignore the pooled trust nature of a multiemployer plan and force a transfer of contributions on behalf of all of an employer's employees, why would this not apply equally to a transfer of only a portion of the employees? This of course could produce a split bargaining unit, presumably overriding any plan provisions (such as Central States has) that would prohibit it. Finally, why should not a single employee who, for example, quits work, be able to set up an individual retirement account and demand a transfer of assets to it? While the court of appeals states that its decision

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[10] If the court had limited its decision so as to relate the asset transfer to the new plan's assumption of vested benefit liabilities, it still would be wrong, but at least the decision would more closely accord with ERISA. In actuality the decision turns the ERISA rules on their head, increasing the old plan's liabilities while providing a windfall to the new plan—the opposite of what ERISA's transfer rules allow.

does not reach that far, it is not an illogical reach if the "exclusive use" language mandates any transfer at all.[11]

In short the court of appeals decision invites chaos. In the flood of litigation that we can assume will follow the court of appeals decision, if it is not reversed, these limits will no doubt be tested and principles will be sought upon which to base "reasonable" asset transfers. It is all unnecessary, however, because the court of appeals was wrong. Had it examined ERISA, the court would have seen that Congress had expressly provided what plans and employers may and may not do to transfer assets and liabilities among plans. This oversight threatens, by undercutting ERISA's careful regulation, to bring an end to multiemployer defined benefits pension plans.

CONCLUSION

The decision of the court of appeals tramples the express language of and important national policies underlying ERISA, and jeopardizes the continued existence of multiemployer trust funds like Central States. This Court should grant the writ of certiorari. The court of appeals should be reversed.

Respectfully submitted,

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[11] If pension portability were already mandated by the LMRA, then ERISA need not have grappled with it as it did in Title III of ERISA. In fact neither Congress, nor anyone else believed portability was already upon us until the court of appeals surprising discovery.